Art Bunce, SBN 60289
Kathryn Clenney, SBN 174177
LAW OFFICES OF ART BUNCE
430 North Cedar Street, Suite H
P.O. Box 1416
Escondido, CA 92033
Tel.: 760-489-0329
FAX: 760-489-1671

Dana W. Reed, SBN 64509
Darryl R. Wold, Of Counsel, SBN41193
REED & DAVIDSON, LLP
520 South Grand Avenue, Suite 700
Los Angeles, CA 90071-2665
Tel.: 213-624-6200
FAX: 213-623-1692

Bernard P. Simons, SBN 41094
James C. Martin, SBN 83719
Ezra Hendon, SBN 41912
CROSBY, HEAVEY, ROACH & MAY
1901 Avenue of the Stars, Suite 700
Los Angeles, CA 90067-6078
Tel.: 310-734-5200
Fax: 213-457-5299

Attorneys for specially-appearing defendant
Agua Caliente Band of Cahuilla Indians

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

FAIR POLITICAL PRACTICES COMMISSION, a state agency, Plaintiff, vs. AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally-recognized Indian tribe; and DOES I-XX, Defendants.	Civil case no. 02AS04545 OBJECTION OF SPECIALLY-APPEARING DEFENDANT AGUA CALIENTE BAND OF CAHUILLA INDIANS TO APPLICATION OF CALIFORNIA COMMON CAUSE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO MOTION TO QUASH SERVICE FOR LACK OF PERSONAL JURISDICTION AND RESPONSE THERETO [C.C.P. §418.10] Hearing: January 8, 2003 2:00 p.m. Dept. 53 Honorable Loren E. McMaster

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

OBJECTION TO APPLICATION OF CALIFORNIA COMMON CAUSE TO FILE BRIEF AMICUS CURIAE

Specially-appearing defendant the Agua Caliente Band of Cahuilla Indians (the "Tribe") hereby objects to the application of California Common Cause ("CCC") to file a brief amicus curiae in support of the FPPC on the Tribe's pending motion to quash service. The grounds for the Tribe's objection follows. The Tribe requests the Court to deny the application of CCC. However, if the Court wishes to grant the application and consider CCC's proposed brief amicus curiae, then the Tribe also asks the Court to consider the Tribe's response to that brief. That proposed response follows after this objection and the grounds therefore.

GROUNDS FOR OBJECTION

1. *Timing*. CCC has known about this litigation since it was filed on July 31, 2002, and about the present motion since it was filed on November 6, 2002. However, CCC waited until 5:06 p,m., after the close of business, on December 10, 2002 to serve by FAX on counsel for the Tribe a copy of its application to file a brief amicus curiae, and a copy of the proposed brief. This was the same day when the FPPC's opposition to the present motion was also due to be filed, in anticipation of the filing of the Tribe's reply brief on December 13, 2002. CCC's proposed brief amicus curiae was accompanied by massive declarations and exhibits, none of which were received by the Tribe's counsel until December 11, 2002. The volume and timing of CCC's tardy filing suggests coordination with the FPPC, particularly when CCC's proposed brief amicus curiae says little not already contained in the FPPC's opposition. Such coordination suggests a desire to overburden the Tribe in the two full working days during which the Tribe initially might have made a response to the CCC brief while, at the same time, preparing, filing and serving its reply brief on the motion to quash.

By coincidence, an unexpected flood in the office of the Tribe's counsel led the Tribe to request, and the Court to grant, a delay in the hearing date until January 8, 2003. Still, the gamesmanship is obvious.

2. *Duplication.* Very little, if any, of the content of CCC's proposed brief amicus curiae is not already ably presented in the opposition of the FPPC to the Tribe's motion. Although CCC states that "it would be helpful for this Court to consider additional arguments" (CCC App., p. 2, lines 19-20), the Tribe cannot identify any arguments made by CCC which are not already made by the FPPC. CCC does not identify which of its arguments are "additional."

3. *Adequate representation.* Both the FPPC and CCC seek to vindicate interests reflected in the Political Reform Act, Government Code §81000, et seq. (the "Act"). The FPPC is the agency of the government of the State of California charged by law with doing so. CCC makes no showing that its interests, which it claims to be identical to those of the FPPC in enforcing the Act, are not already more than adequately represented by the FPPC. Indeed, one of the declarations filed by the FPPC in support of its opposition is by James K. Knox, the Executive Director of CCC. If CCC believes that representation of its interests by the FPPC is so inadequate as to require CCC to appear separately as an amicus, then why did CCC provide the declaration of its Executive Director to the FPPC?

For the above reasons, the Tribe urges the Court to deny the application of CCC to file its proposed brief amicus curiae. However, if the Court wishes to consider that brief, then the Tribe responds to that brief as follows.

RESPONSE TO BRIEF AMICUS CURIAE OF CCC

I. CCC MISPERCIEVES THE NATURE OF AN INDIAN TRIBE.

At p. 1, lines 1-2 of its brief, CCC states that the Tribe "is an aggregation of roughly 300 is an aggregation of roughly 28,000,000 individuals. On the contrary, like California, the Tribe is a *government*, and definitely *not* a mere collection of individuals, as claimed by CCC:

> "Indian Tribes within 'Indian country' are a good deal more than 'private voluntary organizations.'" They 'are unique aggregations possessing attributes of sovereignty over both their members and their territory."
>
> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1981), quoting *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975)

The U.S. Supreme Court recognizes that tribes possess, as an essential attribute of their status as sovereign governments, the power to tax, which is perhaps the *sine qua non* of governments:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. The power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.
>
> *Id.*, 455 U.S. at 137

Like other governments, a Tribe exists separate and apart from its individual members, much as the State of California exists separate and apart from its citizens:

> . . . Indian tribes can be viewed as specific governmental and legal entities distinct from their members. [cit.om.] Thus, we assume for purposes of this appeal that the Band, as a separate entity apart from its individual members, can pursue on its own behalf certain

> legal actions distinct and separate from similar or related claims of its members.
>
> *Hopland Band of Pomo Indians v. U.S.* 855 F.2d 1573, 1576 (Fed.Cir., 1988)

Furthermore, Congress has specifically differentiated between a tribe and its individual members in the grant of jurisdiction that it made to states, such as California, in P.L. 280, Act of August 15, 1953, 18 U.S.C. §1162 (criminal) and 28 U.S.C. §1360 (civil). While this statute

> [T]here is notably absent [from P.L. 280] any conferral of state jurisdiction over the tribes themselves . . .
>
> *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976)

Because P.L. 280 granted to California absolutely zero jurisdiction of any kind over tribes, as opposed to individual Indians, P.L. 280 also does not waive tribal sovereign immunity:

> We have never read Pub.L. 280 to constitute a waiver of tribal sovereign immunity . . .
>
> *Three Affiliated Tribes of Fort Bethold Reservation v. Wold Engineering*, 476 U.S. 877, 892 (1986)

Even as to individual Indians, over whom P.L. 280 did grant a measure of civil jurisdiction to California, that degree of civil jurisdiction pertains *only* to application of a state's criminal/prohibitory laws, as opposed to its civil/regulatory laws. See *Bryan, supra,* and *Middletown Rancheria of Pomo Indians v. Workers' Compensation Appeals Board,* 60 Cal.App.4th 1340, 1351-1356 (1998) in which the Court of Appeal held that California's workers' compensation laws were civil/regulatory, and thus outside the scope of the grant of jurisdiction to California under P.L. 280.

Applying the same analysis as in *Middletown, supra,* the Act is clearly civil/regulatory, and thus also outside the scope of California's jurisdiction over individual Indians under P.L.

280. The underlying activities in question (i.e., making political contributions, engaging lobbyists, etc.) are clearly permitted, rather than prohibited, although heavily regulated by the Act. Thus, the Act does not apply to the Tribe under P.L. 280[1] for two reasons. First, under P.L. 280, *no* state statute of any kind applies to the Tribe. Second, under P.L. 280, the Act is civil/ regulatory in nature, and therefore outside the scope of P.L. 280. In this way Congress has deliberately chosen to leave the Tribe outside the scope of the jurisdiction that it conferred on California under P.L. 280. In the same way, Congress clearly distinguishes between the Tribe and its members in the grant of civil jurisdiction which it conferred on California in P.L. 280.

Therefore, CCC is flat wrong and misleads the Court in asserting that the Tribe is no more than a collection of individuals. On the contrary, the Tribe is a government which Congress has intentionally left outside the jurisdiction that it has conferred on California.

II. THE TRIBE DOES NOT CLAIM TO BE ABOVE THE LAW.

CCC again jumps to an unwarranted conclusion at lines 25-26 of p. 1 of its brief in asserting that the Tribe claims that it "is above the law, and therefore free to ignore with impunity the PRA's reporting requirements." The Tribe makes no such claim. As a responsible government, the Tribe agrees with the goals of the Act and is willing to conform to the substance of the Act. The Tribe differs with the FPPC only as to exactly how the Tribe does so.

Instead of claiming to be above the law, the Tribe claims only that the FPPC may not impose the requirements of the Act directly on the Tribe by suit, as the FPPC does with other parties for which the relationship is that of regulator and regulated. The Tribe invites the FPPC to treat it as a government, rather than an object of regulation. If the FPPC will do so, the Tribe

---

[1] This argument pertains to the Tribe and its members only within Indian country, on the Agua Caliente Indian Reservation. As to the CCC's claims that the Act applies to the Tribe for the Tribe's supposed off-reservation activities, see the separate argument on that point, *post*.

has always been willing, and still is willing, to discuss an appropriate agreement with the FPPC by which the Tribe provides the detailed information that the Act requires, but in a format and on a timetable, which may or may not be precisely that which the FPPC demands of private parties, but which still meets the needs of the FPPC, while recognizing the Tribe's status as a government. The Tribe will treat with the FPPC on a government-to-government basis, but refuses to be bludgeoned into submission.

III. CCC MISPERCIEVES THE NATURE OF TRIBAL SOVEREIGN IMMUNITY.

At line 1 of p. 4 of its brief, CCC claims that "tribal sovereign immunity from suit is 'of limited character.' [citing] *United States v. Wheeler*, 435 U.S. 313, 323 (1978)." As before, this statement and citation are not only wrong, but also misleading. Instead of providing the full context in which "of limited character' appears, CCC extracts only those words and applies them to "tribal sovereign immunity", when the subject of the paragraph was tribal sovereign authority in general, *not* tribal sovereign immunity. The full text reads:

> The sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.
>
> *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978)

The Ninth Circuit recognizes the distinction between tribal sovereign authority in general and tribal sovereign immunity in particular:

> In pressing this argument, he [Dawavendewa, the plaintiff] correctly notes . . . that "the inherent sovereign powers of an Indian Tribe do not extend to the activities of non-members of the Tribe."
>
> From this solid precipice, however, Dawavendewa plummets to the assertion that the [Navajo] Nation cannot assert tribal sovereign immunity against Dawavendewa's claims. **We disagree. Indeed, with this conclusion, Dawavendewa appears to confuse the fundamental principles of tribal sovereign authority and**

> **tribal sovereign immunity.** The cases Dawavendewa cites address only the extent to which a tribe may exercise jurisdiction over those who are non-members, i.e., tribal sovereign authority. These cases do not address the concept at issue here—our authority and the extent of our jurisdiction over Indian Tribes, i.e. tribal sovereign immunity.
>
> In the case at hand, the only issue before us is whether the [Navajo] Nation enjoys sovereign immunity from suit. We hold that it does, and accordingly, it cannot be joined nor can tribal officials be joined in its stead.
>
> *Dawavendewa v. Salt River Project, etc.*,
> 276 F.3d 1150, 1161 (9th Cir., 2002, emphasis added).

Therefore, what is "of limited character" is tribal sovereign authority, those matters in which a balancing of interests between federal, state, and tribal interests occurs in determining whether a particular state statute applies to a tribe as a threshold matter. What is *not* of limited character is tribal sovereign immunity, a state trying to sue a tribe for judicial enforcement of a state statute which has previously been determined to apply to the tribe as a threshold matter. As the California Supreme Court has held, "Indian tribes enjoy *broad* sovereign immunity from lawsuits," *Boisclair v. Superior Court*, 51 Cal.3d 1140, 1157 (1990, emphasis added). Regarding tribal sovereign immunity, as opposed to tribal sovereign authority, there is no such balancing.[2]

CCC compounds its misperception by stating at line 2 of p. 4 of its brief that "any analysis of its [i.e., tribal sovereign immunity's] application to a given case is necessarily context-specific." This is simply not so, as noted in part III.A. of the Tribe's reply brief, where the Tribe shows that there is *never* a balancing of interests or consideration of the merits of a plaintiff's claim in determining whether a state may sue to enforce a right which a previous interest analysis determines that the state has. The immunity analysis is *never* context-specific.

---

[2] See the full discussion of this distinction at part III.A, pp. 9-12, of the Tribe's reply brief. This discussion also applies to several of CCC's other arguments. For example, the "generalizations are particularly treacherous" and "no inflexible per se rule" quotations at lines 19-23 of p. 3 of CCC's brief pertain *only* to tribal sovereign authority, and *not* to tribal sovereign immunity.

Instead, the immunity analysis asks only if Congress or the Tribe has unequivocally waived the immunity. If not, the analysis ends there, even if a substantive right emerges from an interest analysis, as it did in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991). To the extent that CCC blurs the two analyses, it is again simply wrong.

IV. CCC IS BOTH WRONG AND PRESUMPTUOUS IN DECLARING THAT FORCED COMPLAINCE WITH THE ACT INFRINGES ON NO SOVEREIGN INTEREST OF THE TRIBE.

At lines 15-16 of p. 2 of its brief, CCC states that "this Court's exercise of jurisdiction over this suit implicates none of Agua Caliente's sovereign interests." What is the basis for this arrogant and presumptuous statement? How does CCC know what the Tribe's sovereign interests are? On the contrary, the Tribe *does* have two major sovereign interests.

First, the Tribe has the same sovereign interest that *every* sovereign has in not being hauled into the courts of another sovereign without its consent. The U.S. Supreme Court has provided an exhaustive discussion of how the Founders understood that the new federal courts would not have jurisdiction over a suit against an unconsenting state in *Alden v. Maine*, 527 U.S. 706, 716-727 (1999). Just as the states never understood that the U.S. Constitution would subject them to suit by private parties in the courts of the new federal sovereign, tribes are just as loathe to be subjected to suit in the courts of the states. This principle applies to *every* sovereign:

> The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts, not of its own choice . . . This reasoning is particularly applicable to Indian Nations. . . .
>
> Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void.
>
> *U.S. v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 513, 514 (1940)

In the analysis of whether an absent tribe may be a necessary and indispensable party to an action, the absent tribe's interest is so compelling that dismissal in its absence

> is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims. [cit.om.] Indeed, some courts have held that sovereign immunity forecloses in favor of the tribes the entire balancing process under Rule 19(b) . . .
>
> *American Greyhound Racing, Inc. v. Hull*, 305 F.2d 1015, 1025 (9th Cir., 2002)

Thus, the Tribe has an enormous interest in not being summoned not just into this litigation, but into *any* litigation not of its choice, no matter what its merits, just as do other sovereigns.

Second, the Tribe has a great interest in exercising its self-government. Since the 1960's, an "overriding goal" of federal policy has been "encouraging tribal self-sufficiency and self-development." This policy is evidenced by many federal statutes, which the U.S. Supreme Court describes as "important federal interests"[3] and "compelling federal and tribal interests" in promoting tribal self-government, sufficiently compelling to outweigh California's interests.[4] The bulk of the Tribe's contributions in question are derived from governmental gaming, the statutory basis for which finds that "a principal goal of Federal Indian policy is to promote strong tribal government." 25 U.S.C. §2701(4). See also 25 U.S.C. §2702(1).

Tribal government is strengthened by allowing a tribe to relate to other governments on a government-to-government basis, preferably by agreement, as described in Chairman Milanovich's declaration. Tribal government is severely weakened by subjecting it to compulsion by the FPPC, rather than allowing the Tribe and the FPPC to reach an agreement. In this regard, a case on which CCC relies undermines its position.

---

[3] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-217 (1987)

[4] *Id.*, 480 U.S. at 222.

CCC relies at lines 4-6 of p. 13 of its brief on *Minnesota Ethical Practices Board v. Red lake DFL Committee*, 303 N.W.2d 54 (Minn., 1981) for its claim that forced compliance with the individual capacities. No party even claimed sovereign immunity in *Red Lake*. Even if individuals or this committee might have argued that compliance with Minnesota's statute would have adversely affected tribal self-government, that claim evaporates when one notes that no tribal government was a party to *Red Lake*, so any such injury was speculative at best.

Moreover, in another case in which a tribal official *was* a defendant, the Minnesota Court of Appeals upheld the tribal sovereign immunity of a tribal official whose on-reservation actions had an off-reservation effect. The Court of Appeals did so after noting that the merits of the case had no role to play in the immunity analysis, even though there was an off-reservation effect:

> However, tribal immunity is jurisdictional, the purpose of which is to promote the overriding federal policy of tribal self-government. Therefore, tribal sovereign immunity applies to the tribal officials acting in their official capacities, **even where one element of a claim occurred outside the reservation.**
>
> *Driver v. Peterson*, 524 N.W.2d 288, 291 (Minn.Ct.Apps., 1994, emphasis added)

Therefore, taken together, these two Minnesota cases hold that, even if a state's political regulations apply to a committee or individuals without sovereign immunity acting off a reservation, tribal sovereign immunity does protect the same off-reservation conduct when performed by a tribe with sovereign immunity. The difference is not only the presence of sovereign immunity in one case, and its absence in the other. The difference is also the harm to

tribal self-government that occurs to a tribe when a state seeks to impose its statute directly on a tribe by unconsented suit.

Thus, CCC is both flat wrong and undeniably presumptuous in claiming that forced compliance with the Act in this case implicates no sovereign interests of the Tribe. On the contrary, such forced compliance implicates the above two compelling sovereign interests.

V. THIS COURT SHOULD DEFER TO CONGRESS FOR ANY CHANGE IN THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY.

At part VI, pages 18-19, of its reply brief, the Tribe has shown how the U.S. Supreme Court has twice since 1991 declined to modify the doctrine of Tribal sovereign immunity, holding instead that only Congress should make any such change. At lines 6-10 of p. 14 of its brief, CCC urges this Court not to show Congress the same deference in this case because Congress' failure to make the changes that CCC desires supposedly does not flow from the power of Congress "to regulate commerce . . . with the Indian tribes", U.S. Const., Art I, §8, cl. 3. On this point, both CCC's premise and its conclusion are wrong.

Congress' power regarding Indian tribes does not derive solely from the Indian commerce clause. Instead, that power derives from two Constitutional provisions:

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Art. I, §8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and . . . Art II, §2, cl.2, gives the President the power, by and with the advice and consent of the Senate, to make treaties.
>
> *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974)

This plenary power is not limited to matters directly affecting Indian commerce, but instead covers any measure on any subject,[5] and is subject to only one limitation: "As long as the special

[5] See the list of examples provided in *Morton, supra,* 417 U.S. at 555.

treatment can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians, such legislative judgments will not be disturbed." *Id.*, 417 U.S. at 555.

Therefore, CCC is wrong in asserting, at lines 10-14 of p. 14 of its brief, that Congress' failure to change tribal sovereign immunity as CCC prefers deserves no deference because Congress' power to regulate Indian commerce does not extend to matters affecting state elections. Under *Morton, supra,* such deference is required on *all* subjects, if it "can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians."

That standard is easily met in this case. Congress *has* considered all aspects of the doctrine since the U.S. Supreme Court invited Congress to do so in *Kiowa* in 1998, and Congress *has* made the statutory change in the doctrine described in part VI, pp. 18-19, of the Tribe's reply brief. Just because the change that Congress chose to make is not the one espoused by CCC does not make Congress' choice irrational or invalid. CCC should seek relief from Congress, not this Court. In the mean time, this Court should show the same deference to Congress that the U.S. Supreme Court has twice recently held is required when a change to the doctrine is desired.

VI. THE TRIBE HAS NOT EXPRESSLY AND UNEQUIVOCALLY WAIVED ITS SOVEREIGN IMMUNITY IN THIS CASE.

At. fn. 2, p. 12, of its proposed brief, CCC argues that the Tribe's "voluntary entry into California politics and considerable efforts to exert influence . . . constitute a waiver of such [sovereign] immunity." In addition to the responses that the Tribe made in part IV.B, pp. 14-17, of its reply brief to a similar claim by the FPPC, the Tribe now makes the following additional response to the claim, as formulated by CCC.

In its above reply to the FPPC, the Tribe has provided a catalog of actions taken by tribes which have been held *not* to be express and unequivocal waivers of tribal sovereign immunity.

The Tribe will now provide the few examples of actions taken by tribes which *have* been held to be such express and unequivocal waivers.

Filing a proof of a claim in a Bankruptcy Court is an unequivocal waiver. *In re White*, 139 F.3d 1268, 1269 (9th Cir., 1998).

Intervening as a defendant in on-going litigation is an express and unequivocal waiver. *U.S. v. Oregon*, 657 F.2d 1009, 1014 (9th Cir., 1981).

A tribe's use of the following language concerning resolution of disputes in a contract is also an unequivocal waiver of that tribe's immunity, *C & L Enterprises v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 415 (2001):

> All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association . . . the award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

The Tribe is not aware of any other holdings that identify actions by tribes that are so unequivocal as to be effective waivers of tribal sovereign immunity. CCC cites none.

Waivers by Congress must be just as unequivocal. Congress has waived the immunity of all tribes in the Federal Debt Collection Procedure Act, 28 U.S.C. §3001-3308, by specifying that all "persons" have certain obligations under that statute, and then defining "person" to include "a natural person . , a corporation, a partnership, an unincorporated association, *or an Indian tribe.*" *U.S. v. Weddell*, 12 F.Supp.2d 999, 1000 (D.S.D., 1998, emphasis added).

Similarly, although the Indian Civil Rights Act, 25 U.S.C. §1302, imposes on tribes the duty to provide certain protections very similar to those provided by the Bill of Rights, that

statute explicitly provides *only* one remedy, that of habeas corpus, for its enforcement.[6] For this and related reasons, the U.S. Supreme Court refused to imply any civil enforcement remedy in the federal courts under this statute. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Furthermore, as *Kiowa Tribe v. Manufacturing Technologies, Inc.* 523 U.S. 751 (1998) and *Redding Rancheria v. Superior Court*, 88 Cal.App.4th 384 (2001) both hold, a tribe's immunity extends to its off-reservation conduct. Neither case distinguishes between a tribe's off-reservation conduct that affects only private parties and such conduct that affects a state, because the holdings of each are broad and general, not admitting of *any* such distinctions.

The Tribe itself has not engaged in *any* off-reservation conduct.[7] Even if the Tribe is viewed as having engaged in off-reservation conduct, *Kiowa* and *Redding* both hold that such conduct is still within a tribe's sovereign immunity. Even if this were not so, any such conduct in this case is definitely not unequivocal, and is clearly within the realm of those activities by tribes which do not waive their immunity,[8] rather than those few activities noted above which do.

VII. THE FPPC HAS VIABLE ALTERNATIVES TO SUBJECTING THE TRIBE TO FULL COMPLIANCE WITH THE ACT.

At various places in its proposed brief and declarations, CCC bemoans how the FPPC cannot perform its essential functions by anything other than full dual reporting. This is not so. In addition to the alternatives described in part II.C, pp. 6-8, of the Tribe's reply brief, the Act itself provides another alternative. Government Code §90001 sets forth an elaborate and comprehensive procedure by which single reporting (by recipients of donations and lobbyists), when coupled with audits by the FPPC, achieves the same degree of verification of compliance

---

[6] "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. §1303.
[7] See the Tribe's reply brief, p. 16, lines 4-12.
[8] See p. 13, line 13 to p. 17, line 2, of the Tribe's reply brief.

with the Act as does dual reporting. Under part (a) this procedure, lobbying firms are subject to random audits, with a 25% likelihood of an audit of any particular firm. Similarly, under part (b), at least 10% of all statewide candidates receiving more than $25,000 in donations must be audited. Under part (c), at least 25% of all legislative candidates receiving over $15,000 in donations must be audited. And under part (g), 100% of all committees supporting or opposing a statewide ballot measure and receiving more than $10,000 in donations must be audited.

Thus, although dual reporting may lighten the FPPC's administrative burden, single reporting by lobbyists and recipients of donations (either candidates or ballot propositions), when coupled with the kinds of audits that the FPPC already routinely performs, will also produce satisfactory evidence of compliance, or will detect non-compliance. This alternative procedure is not only adequate to achieve the goals of the Act, but can be accomplished entirely without any participation by the Tribe. Therefore, CCC vastly overstates the case when it, or its declarants, wring their hands and assert that *only* full dual reporting will achieve the goals of the Act. The FPPC has available to it the above fully equivalent means to achieve the same goal, and to do so without asking the Tribe to do anything.

CONCLUSION

In its reply brief the Tribe has already responded to CCC's other major points. The Tribe has shown that, no matter how compelling a state's interest may be in enforcing a state statute against a tribe by direct suit against that tribe, the nature of that interest does not waive the tribe's immunity for that suit, even if an underlying substantive right might otherwise exist. The Tribe has already shown that there is no balancing of interests, no discretion, and no consideration of equities regarding tribal sovereign immunity, although such balancing may occur in other contexts. The Tribe has shown that its conduct has occurred entirely on the Agua

Caliente Indian Reservation, and this conduct is not an unequivocal waiver of its sovereign immunity. And the Tribe has already noted how Justice Stevens' dissents in *Potawatomi* and *Kiowa* are only his own minority views in cases in which the majority rejected those views in their majority opinions.

CCC's parade of horribles (serving as a conduit for tainted funds, etc.) is pure speculation. In their voluminous declarations, neither the FPPC nor CCC offers a scintilla of evidence of any such conduct. The Tribe already voluntarily abides by the Act's contribution limits, and neither the FPPC nor CCC claims otherwise. The present dispute is solely over the timing and format of reporting those contributions. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), California claimed that the possibility of the infiltration of tribal bingo parlors by organized crime justified the application of a state statute in that case. The U.S. Supreme Court rejected that claim as speculative, for lack of any evidence to support it. *Id.*, 480 U.S. at 212-214. This Court should similarly disregard CCC's current speculation, especially when each of the CCC's fears can be addressed in a government-to-government agreement between the FPPC and the Tribe.

The Tribe will close this response by quoting from an opinion of the Ninth Circuit delivered in June of 2002. That opinion succinctly summarizes both the true legal status of the Tribe as subject *only* to the federal sovereign, and the policy rationale for not thinking it somehow amiss that a tribal sovereign would not be subject to an enforcement action by a state sovereign of that other sovereign's laws:

> The status of Indian tribes as sovereign entities, and as federal dependents, contradicts conventional notions of citizenship in general and *state* citizenship in particular. A citizen is "[a] person who . . . is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections . . ." Black's Law Dictionary (7th ed. 1999). Tribes

> fall outside this definition. Rather than belonging to state political communities, they themselves are "'distinct, independent political communities,'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832)). Tribes also owe no allegiance to a state. Because "Congress possesses plenary power over Indian affairs," [cit.om.], Indian tribes fall under nearly exclusive federal, rather than state, control. *Cf. Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 154, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) ("[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.") Moreover, tribal sovereignty and federal plenary power over Indian affairs, taken together, sharply circumscribe the power of the states to impose citizen-like responsibilities on Indian tribes.
>
> *American Vantage Co. v. Table Mountain Rancheria*, 292 F.3d 1091, 1096 (9th Cir., 2002)

For the above additional reasons, Tribe's motion to quash should be granted.

Dated: December 27, 2002

Respectfully submitted,

Art Bunce
Attorney for specially-appearing defendant the Agua Caliente Band of Cahuilla Indians